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May 31, 2013

VIA EMAIL (secretary@fmc.gov),
(judges@fmc.gov)
AND HAND DELIVERY

Karen V. Gregory, Secretary
Office of the Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, et al. Federal Maritime Commission: Docket No. 09-01

Dear Ms. Gregory:

We are attorneys representing Respondents CJR World Enterprises, Inc. and Chad J. Rosenberg ("CJR Respondents") in the above captioned matter currently pending in the Federal Maritime Commission.

Please find enclosed an original and five (5) copies of the CJR Respondents' Joinder, Appendix and Exhibits R, S, and T.

A PDF and Word version of the filing has been emailed to both secretary@fmc.gov and judges@fmc.gov. Please stamp a conformed copy and return same to our messenger who has been instructed to wait.

Sincerely yours,

Ronald N. Cobert

VIA EMAIL ONLY (w/encls.)

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BEFORE THE
FEDERAL MARITIME COMMISSION

CC: OS
OGC
ALJ(2)
Pub

ORIGINAL

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S JOINDER IN THE OLYMPUS RESPONDENTS' MOTION TO STRIKE AND RESPONSE TO THE REBUTTAL PROPOSED FINDINGS OF FACT SUBMITTED BY COMPLAINANT MITSUI O.S.K. LINES, LTD.

COME NOW Respondents CJR World Enterprises, Inc. ("CJRWE") and Chad J. Rosenberg (collectively, "CJR Respondents"), and submit this their Joinder in the Olympus Respondents' Motion to Strike and their Response to the Rebuttal Proposed Findings of Fact Belatedly Submitted by Complainant Mitsui O.S.K. Lines, Ltd. ("MOL"), and respectfully show the Administrative Law Judge ("ALJ") as follows:

INTRODUCTION

On May 1, 2013, MOL filed its Reply Brief in Further Support of its Claims Against Respondents (the "Reply Brief"). In the Reply Brief, MOL asserts factual positions and legal theories which are utterly and completely at odds with those asserted by MOL throughout this

case, including in its Opening Submission. MOL also submitted Rebuttal Proposed Findings of Fact with its Reply Brief, even though the ALJ's Procedural Orders did not instruct or allow MOL to do so. On May 24, 2013, the Olympus Respondents filed a motion to strike based on, among other grounds, MOL's change in position with respect to its knowledge of split routing. The CJR Respondents file this brief to respond to MOL's belatedly introduced proposed findings of fact and to join in the Olympus' Respondents Motion to Strike.

ARGUMENT AND CITATIONS OF AUTHORITY

A. MOL Should Not Be Permitted to Change its Theory of the Case at the Eleventh Hour.

In its Reply Brief, MOL adopts an entirely new theory of its case. Throughout this case MOL has asserted that it did not know that GLL engaged in the practice of split routing. Now MOL acknowledges that the two employees who are the central witnesses in this case did in fact know about the practice of split routing. MOL's belated shift in position is incredulous, unjustifiable and prejudicial.

The two MOL employees at issue are Paul McClintock and Rebecca Yang. Mr. McClintock and Ms. Yang were the employees of MOL who serviced the GLL account. Mr. McClintock was a Vice President of MOL for fifteen years. (Complainant's Response to Rosenberg Respondents' Third Interrogatories and Requests for Production of Documents, number 3, annexed hereto as Exhibit "R") (CJR Respondents' Appendix ("CJR App."), at pp. 306-07).[1] According to Interrogatory answers MOL served during discovery, one of Mr.

[1] The CJR Respondents' Appendix submitted in support of their Joinder in the Olympus Respondents' Motion to Strike and Response to the Rebuttal Proposed Findings of Fact Belatedly Submitted by Complainant MOL ("Joinder") is a continuation of the Appendices the CJR Respondents previously submitted in support of their Brief in Response to the Opening Submission of Complainant MOL ("Brief in Response to MOL") and their Brief in Response to GLL's Opening Brief in Support of its Claims for Contribution ("Brief in Response to GLL"). Accordingly, any documents submitted to support the Joinder, which were not submitted to support the Brief in Response to MOL or the Brief in Response to GLL, will begin with CJR Exhibit "R" and will begin at CJR Appendix p. 303. Any citations to CJR Exhibits A through I or to CJR App. pp. 1 through 101, reference the

McClintock's responsibilities was to "promote core values between sales and operations." *See id.*

Mr. McClintock and Ms. Yang have been key witnesses in this case since day one. MOL is well aware of this given that they were interviewed extensively before MOL filed this lawsuit.

Until MOL filed its Reply Brief, MOL vigorously denied that Mr. McClintock and Ms. Yang knew of the practice of split routing. Rather, MOL has always taken the position that they were loyal employees, arguing vehemently that they knew of only limited instances in which GLL had engaged in split routing. Now in the face of the Respondents' submissions demonstrating that Mr. McClintock, Ms. Yang, and others at MOL had knowledge regarding GLL's practice of split-routing, MOL concedes that Mr. McClintock and Ms. Yang had more than just limited knowledge of split routing. Indeed, in an attempt to completely disavow itself of their knowledge, MOL concocts a story that they not only had knowledge of split routing but also were in collusion with GLL, Mr. Rosenberg and Mr. Briles against MOL. MOL's new "story" is in stark contrast to the story it has told since this litigation began

Setting aside that MOL's claim that GLL, Mr. Rosenberg and Mr. Briles conspired with Mr. McClintock and Ms. Yang to defraud MOL is wildly speculative and not supported by the evidence, MOL's attempt to drastically revise its legal theories in this case should not be allowed. MOL has attempted to justify its convenient shift in its position by pointing to the evidence recently submitted by the Respondents. However, most if not all of the evidence which MOL now concedes demonstrates Mr. McClintock and Ms. Yang's knowledge and alleged complicity has been available to MOL for years. Mr. Hartmann had the benefit of Mr. Briles' deposition testimony from the arbitration, as well as pleadings from the arbitration, when he first

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Appendix the CJR Respondents submitted in support of their Brief in Response to MOL. Any citations to CJR Exhibits J through Q, or CJR App. pp. 102 through 302, reference the Appendix the CJR Respondents submitted in support of their Brief in Response to GLL.

interviewed Mr. McClintock and Ms. Yang *prior to* MOL's filing this lawsuit. (Complainant's Declaration of Kevin J. Hartmann, MOL's Exhibit "BM," at ¶ 17) (MOL's Appendix ("MOL App."), at p. 1632).[2] Mr. Hartmann and MOL also obviously had available prior to the filing of this lawsuit all of MOL's own records that *it* later produced in this case, including communications involving Mr. McClintock and Ms. Yang which MOL now acknowledges demonstrate that they were well aware of split-routing. Also, prior to filing its Opening Brief, MOL had available all of the evidence which came to light during discovery in this case. Despite this evidence being available to MOL, MOL took the position in its Opening Brief that Mr. McClintock and Ms. Yang had limited knowledge regarding the practice of split routing.

MOL cannot conveniently do a one-hundred eighty degree shift of its position to try to respond to unfavorable evidence that renders the legal position it has maintained to date completely flawed. This is a fraud lawsuit and the Respondents are absolutely entitled to know the factual basis and legal theories behind MOL's fraud claims so they can fairly and reasonably defend themselves. Allowing MOL to shift its position at the eleventh hour would deprive the Respondents of that right. MOL should thus be estopped from sandbagging the Respondents by shifting positions at the finish line of this case to the Respondents' detriment. *See Wheatley v. Wicomico Cnty., Md.*, 390 F.3d 328, 335 (4th Cir. 2004) ("Plaintiffs raised their new theory at the eleventh hour-once they sensed that their original theory was doomed. The new argument did not appear in the complaint, nor was it mentioned to the jury in opening statements. And the switch caught the trial judge and opposing counsel completely by surprise. . . .The adversary system cannot function properly if lawyers are allowed to dump arguments on a district court at

[2] MOL's response to the CJR Respondents' Proposed Finding of Fact 108 is puzzling. MOL waived the privilege with respect to certain of Kevin Hartmann's communications but it conveniently maintains the privilege with respect to e-mails involving Nicole Hensley, who was aware of instances in which GLL had engaged in split routing. MOL has curiously offered no explanation for why e-mails sent in 2007 would be on a privilege log for this case if they did not involve split routing.

the last minute, without developing them during the course of litigation. Certainly, litigants are permitted to make alternative arguments as part of their case-in-chief. But there is a thin line between an alternative argument and a last-minute switch in strategy which risks severely prejudicing an opponent and surprising the district court. This situation is an example of the latter. Despite plaintiffs' contention to the contrary, it is insufficient that the evidentiary basis for their second argument may exist somewhere in the record. . . . Lawyers have a duty not just to submit evidence, but to provide some focus to their argument. This was not done here."); *Carr v. Gillis Associated Indus., Inc.*, 227 F. App'x 172, 176 (3d Cir. 2007) ("District Courts have broad discretion to disallow the addition of new theories of liability at the eleventh hour. *See, e.g., Speziale v. Bethlehem Area Sch. Dist.*, 266 F.Supp.2d 366, 371 n. 3 (E.D. Pa.2003) ('Plaintiff's counsel cannot reasonably expect to amend the complaint after the close of discovery merely by raising new arguments in the responsive papers' to a motion for summary judgment.); *OTA P'ship v. Forcenergy, Inc.*, 237 F. Supp. 2d 558, 561 n. 3 (E.D. Pa.2002) (holding that a new claim that was first raised in opposition to a motion for summary judgment was 'too late')); *Dux Capital Mgmt. v. Chen*, No. C 03-00540 WHA, 2004 WL 1936309, at *4 n.2 (N.D. Cal. Aug. 31, 2004) *aff'd sub nom. Davis v. Yageo Corp.*, 481 F.3d 661 (9th Cir. 2007) ("This new argument is untimely and inapposite to defendants' earlier position. Hence, it will not be considered.").

At a minimum, the fact that MOL has belatedly and incredulously made a drastic change in its position should cast serious doubt on the merits and credibility of MOL's arguments and theories.[3]

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[3] Given MOL's belated shift in position, this is the CJR Respondents' first opportunity to respond to MOL's allegations that they conspired with Mr. McClintock and Ms. Yang. While the CJR Respondents agree with the Olympus Respondents that MOL's new theories should be stricken, lest there be any doubt, the CJR Respondents unequivocally and vigorously deny these allegations, and the evidence does not support them. Mr. Rosenberg

B. MOL Misstates the Adverse Interest Exception to the Imputation Rule, and the Exception Does Not Apply.

Recognizing the negative impact of Mr. McClintock and Mr. Yang's knowledge of split routing on their claims, MOL attempts to argue that their knowledge is not imputed to MOL based on the adverse interest exception. To make this argument, MOL erroneously suggests in its Reply Brief that courts broadly construe the adverse interest exception. However, MOL's representations regarding the law are inaccurate. Rather, in contrast to MOL's argument in footnote 32 of the Reply Brief, the law cited by MOL does not represent the majority view on the application of the adverse interest exception. To the contrary, and as set forth in the Respondents' opening briefs, the majority of courts *narrowly* construe the adverse interest exception and require an agent to have totally abandoned his or her principal's interests in order for the exception to apply. *See, e.g., Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1250 (Fed. Cir. 2007) ("The mere fact that the agent's primary interests are not coincident with those of the principal, however, is not sufficient to invoke the adverse interest exception. Rather, both *federal common law* and New York state law *require that the agent act 'entirely for his own or another's purposes*.'" (emphasis added)); 3 Fletcher Cyclopedia of Private Corp. § 789 (explaining that for the adverse exception to apply, "the agent's relations to the subject

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understood that the practice of split routing was common in the industry and was legal. (Declaration of Chad Rosenberg ("Rosenberg Dec."), dated Feb. 26, 2013, annexed to the CJR Respondents' Brief in Response to MOL as Exhibit "A", at ¶ 5) (CJR App., at p. 2). GLL engaged in the practice of split routing with MOL at Mr. McClintock and Ms. Yang's encouragement and believing it to be legal. (Rosenberg Dec., at ¶¶ 5-6, 10-11, 36-52) (CJR Exh. A) (CJR App. at pp. 2-9); (Declaration of James Briles ("Briles Dec."), dated Feb. 26, 2013, annexed to the CJR Respondents' Brief in Response to MOL as Exhibit "B", at ¶¶ 6-26) (CJR App., at pp. 13-16). GLL was not engaged in a conspiracy with Mr. McClintock and Ms. Yang. Rather, GLL was in a business relationship with MOL, and its representatives were aware of and encouraged a practice which GLL engaged in with shippers other than MOL. The evidence does not support the far-ranging conclusion which MOL is asking the ALJ to draw in order to avoid the repercussions of Mr. McClintock and Ms. Yang'sknowledge of split routing – i.e., that Mr. McClintock, Ms. Yang, Mr. Rosenberg and Mr. Briles were colluding with each other to defraud MOL.

Notably, given MOL's shift in its position, to prove MOL was in fact defrauded as MOL alleges, since MOL acknowledges that its agents in fact knew of the practice of split routing MOL *must prove* that the Respondents were colluding with its agents against MOL. MOL has failed to meet its burden in that regard.

matter must be 'so adverse as practically to destroy the relation of agency'"); Restatement (Second) of Agency § 282 (1958) ("[A] principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal *and entirely for his own or another's purposes*."); Restatement (Third) Of Agency § 5.04 (2006) ("[N]otice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. Nevertheless, notice is imputed . . . when the principal has ratified or knowingly retained a benefit from the agent's action."); *see also USACM Liquidating Trust v. Deloitte & Touche*, No. 11-15626, 2013 WL 1715532 (9th Cir. Apr. 22, 2013) ("[T]he adverse interest exception . . . precludes the general imputation of an agent's acts to the principal corporation under agency law when the agent's actions are '*completely and totally adverse to the corporation*.'"); *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1218-19 (D. Nev. 2011) *aff'd sub nom. USACM Liquidating Trust v. Deloitte & Touche*, No. 11-15626, 2013 WL 1715532 (9th Cir. Apr. 22, 2013) (determining, as a federal court, that Nevada would adopt the law promulgated by other jurisdictions that the adverse interest exception requires "an agent to *completely abandon* the principal's interests and act entirely for his own purposes" and further stating, "*Courts generally require total abandonment* to invoke the adverse interest exception because '[t]his rule avoids ambiguity where there is a benefit to both the insider and the corporation, and reserves this most narrow of exceptions for those cases-outright theft or looting or embezzlement-where the insider's misconduct benefits only himself or a third party . . .'" (emphasis added)); *Tobacco Tech., Inc. v. Taiga Int'l N.V.*, 388 F. App'x 362, 373 (4th Cir. 2010) (overruling district court, which held that the interests were "sufficiently adverse" for adverse exception to apply; reasoning that plaintiff was not able to establish that the

interests were "completely adverse"; and stating that "under the 'adverse interest exception' to this rule, a principal may 'avoid imputation when the agent's interests are sufficiently adverse' to its own. To make out this exception, *the principal bears the burden of showing that 'the agent [has] totally abandoned the principal's interest and [is] acting for his own purposes or those of another. In other words, the interests of the agent must be completely adverse to those of his principal.'* This is because if the agent is acting both for himself and the principal, 'the agent is acting within the scope of the agency relationship, and it is reasonable to assume that the agent will communicate the knowledge to his principal.'" (emphasis added) (citations omitted)); *Collins & Aikman Corp. v. Stockman*, No. CIV. 07-265-SLR-LPS, 2010 WL 184074 (D. Del. Jan. 19, 2010) *report and recommendation adopted*, No. CIV07-265-SLR/LPS, 2010 WL 1687795 (D. Del. Apr. 26, 2010) ("This imputation rule has an 'adverse interest' exception: imputation does not apply where the corporate officer's actions are undertaken solely for the officer's benefit. Michigan law is clear that this 'adverse interest' exception is inapplicable if the officer's actions benefit or are motivated to benefit, at least in part, the corporation." (citation omitted)); *Grede v. Bank Of N.Y.*, No. 08 C 2582, 2009 WL 1657578 (N.D. Ill. June 12, 2009) ("This is known as the adverse interest exception. In order for it to apply, 'the guilty manager must have *totally abandoned* his corporation's interests [.]'" (emphasis added) (alteration in original) (citations omitted)); *In re Sunpoint Sec., Inc.*, 377 B.R. 513, 564 (Bankr. E.D. Tex. 2007) ("The adverse interest exception is a narrow one; for it to apply, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes."); *Great Divide Ins. Co. v. AOAO Maluna Kai Estates*, No. CIV 05-00608 JMS/LEK, 2006 WL 2830885 (D. Haw. Sept. 28, 2006) ("The adverse interest exception 'recognizes that when the interests of the agent and the principal are adverse, the agent's knowledge cannot be

imputed to his principal.' To come within this exception, 'the agent must have totally abandoned the principal's interest and be acting for his own purposes or those of another. In other words, the interests of the agent must be completely adverse to those of his principal.' (citations omitted)); *Brandt v. Lazard Freres & Co., LLC*, No. 96-2653-CIV-DAVIS, 1997 WL 469325 (S.D. Fla. Aug. 1, 1997) ("To invoke the adverse interest exception, however, the Trustee must show that the acts did not benefit Southeast. Thus, knowledge would be imputed if the bank received any benefit from the fraud." (citation omitted)); *Multi-Transp.Corp. v. Gulf States Toyota, Inc.*, No. CIV. A. 93-448, 1994 WL 676445 (E.D. La. Dec. 5, 1994) ("However, if the corporate agent was not acting solely for his own benefit, but also with the interest of the corporation in mind, the 'adverse interest' exception is not applicable.").

MOL argues in its Reply Brief that the ALJ should apply California law on the adverse interest exception based on a choice of law provision in MOL's service contracts. While MOL is quick to point to the choice of law provision in the service contracts to try to gain the benefit of California's unusually broad interpretation of the adverse interest exception rule, notably the precise language in the choice of law provision in the service contracts in no way supports MOL's position that California law applies: "This Contract is subject to the U.S. Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, and shall otherwise be construed and governed by the laws of the State of California, except for its choice of law rules." This language thus refers only to the contract being governed first by the Shipping Act and then secondarily by California law. The provision does not state that other claims between the parties, or claims relating to or arising out of the contract, are governed by a specific law.

Here, MOL is not asserting a claim for breach of the service contracts. Rather, MOL is asserting claims for alleged violations of the Shipping Act. The choice of law provision in

MOL's service contracts is thus immaterial as: 1) on its face it does not apply; and 2) it is well-settled that a contractual choice-of-law provision like the one in MOL's service contracts does not apply to tort or other claims arising between the parties (or non-parties, like the Rosenberg Respondents). *See, e.g.*, *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 987 (7th Cir. 2005) ("A choice of law provision will not be construed to govern tort as well as contract disputes unless it is clear that this is what the parties intended, and there was no clear indication in the Agreement that the parties intended for the choice of law clause to govern tort claims." (citation omitted)); *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1300 (11th Cir. 2003) ("The choice-of-law clause provides that '[t]his release shall be governed and construed in accordance with the laws of the State of Delaware....' The effect of this clause is narrow in that only the release itself is to be construed in accordance with the laws of the State of Delaware. The clause does not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties." (citations omitted)); *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 433 (5th Cir. 1996) ("Narrow choice-of-law provisions are to be construed narrowly. The tort causes of action are separate from the agreement and its enforcement, and thus the choice-of-law provision does not govern them." (citation omitted)); *Investors Equity Life Ins. Co of Hawaii, Ltd. v. ADM Investors Servs., Inc.*, 1 F. App'x 709, 711 (9th Cir. 2001) ("Although parties are generally entitled to select the law which applies to contractual claims, we have expressly determined that tort claims are not governed by a contractual choice-of-law provision."); *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) ("Under New York law, a choice-of-law provision indicating that the *contract* will be governed by a certain body of law does not dispositively determine that law which will govern a claim of *fraud* arising incident to the contract."); *Robinson v. Ladd Furniture, Inc.*, 995

F.2d 1064 (4th Cir. 1993) ("North Carolina federal district courts have similarly rejected the application of contractual choice of law provisions to any actions which do not specifically arise out of the contract."); *see also Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd.*, No. CIV.A. 03-3771, 2004 WL 825466 (E.D. Pa. Apr. 13, 2004) ("To beat the proverbial dead horse, it is undisputed that there is no allegation of damage or misconduct with respect to the cargo; rather, the conflict focuses on the date the carrier issued the bill of lading. As such, the function and purpose of the bill of lading are not called into question. Consequently, its choice of law provision is not relevant here.").

Perhaps most significantly, MOL completely ignores the fact that the Commission has spoken to this very issue and has taken a stricter view than even the courts. In *Sea-Land Service, Inc. - - Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 492 (ALJ 2002), the ocean carrier, Sea-Land, argued that the knowledge of its employees should not be attributed to it. The Administrative Law Judge rejected this argument:

> Since Sea-Land sales representative and other Sea-Land employees enabled the NVOCCs to access the equipment substitution rule in an unlawful manner, the record establishes that Sea-Land through its agents and employees has permitted shippers to obtain ocean transportation at less than the applicable rates and charges by means of an unfair device or means in violation of Section 10(b)(4).

29 S.R.R. 492.

The full Commission later affirmed the Administrative Law Judge's decision:

> The evidence demonstrates that Sea-Land had the requisite knowledge of the equipment substitution scheme at the sales representative level (e.g., Mr. Favor) and at the export sales manager and regional general manager levels (e.g., Messrs. Wing and Spargo, respectively). In addition, Sea-Land's rate auditing and booking departments contributed, directly and indirectly, to the scheme. Accordingly, the Commission affirms the ALJ's finding that Sea-Land violated Section 10(b)(4) of the Shipping Act of 1984 with respect to 149 shipments and that these violations were knowing and willful. These violations were achieved by unjust and unfair means . . .

Sea-Land Service, Inc. – Possible Violations of the Shipping Act of 1984, 30 S.R.R. 872, 887 (Final Decision, served Feb. 8, 2006).

The Commission also addressed this issue in *Pacific Champion Express Co. Ltd. - Possible Violation of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1403 (FMC 2000). In *Pacific*, the Commission rejected the corporation's defense based on the adverse interest exception and instead held the corporation responsible for the knowledge and acts of its employees. In doing so, the Commission held that the corporation's attempted reliance upon the adverse interest exception provision in the Restatement of Agency was unfounded because insulating corporations from the actions of their agents ran contrary to the carriers duties to shippers and to the general public. *Id.* at 1403. The Commission reached this conclusion based in part on the fact that the corporation had broadly delegated authority to its agent and then failed to properly monitor the agent's action. *Id.* The respondent's lack of diligence in monitoring its agents' actions precluded it from disclaiming those actions. *Id.* at 1404.

In addition to *Sea-Land* and *Pacific*, which are directly on point with respect to the legal doctrine at issue in this case, the Commission has also previously addressed the question of a carrier's responsibility for the acts of its agents. In doing so, the Commission has adopted a standard of strict liability for principals based on the acts of their agents. *Hellenic Lines Ltd. – Violations of Sections 16(First) and 17*, 7 F.M.C. 673, 676 (1964); *Unapproved FCC. 15 Agreements - - Spanish/Portuguese Trade*, 8 F.M.C. 596, 609 (1965); *Malpractices - - Brazil / United States Trade*, 15 F.M.C. 55, 59 (1971) ("Shipping Act cannot be circumvented through the medium of an agent"); *Pickup and Delivery – Puerto Rico*, 16 FMC 344, 350 (F.M.C. 1973) ("Respondents cannot insulate themselves from the responsibility for the proper performance of

the service by attempting to relieve themselves of accountability for their agents' acts."). As the Commission stated in *Spanish / Portuguese Trade, supra*:

> Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. As we make clear in *Hellenic Lines Ltd. – Violations of Sections 16(First) and 17,* 7 F.M.C. 673, 676 (1964), we cannot allow a carrier to "immunize itself from the common carrier responsibilities placed upon it by the Act by disassociating itself from any of its agent's activities which are bought into question."

Id. at 576-577 (citations omitted).

Thus, under Commission law, the adverse interest exception does not apply. Setting aside the Commission's very limited view of the applicability of this doctrine, notably, there is no evidence that Mr. McClintock and Ms. Yang were acting for their own personal benefit or that they received any personal benefit from their encouragement of split routing. Rather, the only benefit realized by Mr. McClintock's and Ms. Yang's encouragement of split routing was realized by MOL in the form of increased business. The adverse interest exception rule thus does not apply, and Mr. McClintock and Ms. Yang's knowledge should be imputed to MOL.[4]

C. Even If the ALJ Applies the Restatement Cited by MOL (which it should not), the Adverse Interest Exception Does Not Apply Because MOL Retained the Benefit of its Business with GLL.

Notably, in footnote 28 of the Reply Brief, MOL relies on comments from the Restatement (Third) of Agency, § 5.04. However, MOL fails to point out the part of Section

[4] Even if the ALJ applied the adverse interest exception rule applied by some California courts (which it should not), MOL has not carried its burden to show the exception applies. The evidence in no way supports MOL's speculative argument that GLL, Mr. Rosenberg, and Mr. Briles colluded with Mr. McClintock and Ms. Yang against MOL. MOL also has not shown that GLL, Mr. Rosenberg, and Mr. Briles knew or had reason to know that Mr. McClintock or Ms Yang would not advise MOL that GLL was engaging in split routing (assuming the ALJ concludes that they did not advise MOL – a conclusion which is not supported by the evidence). MOL also has not shown that Mr. McClintock and Mr. Yang were acting adversely to MOL, their principal. To the contrary, Mr. McClintock and Ms. Yang's actions on behalf of MOL secured business for MOL that MOL would not have gotten but for their conduct. MOL thus cannot meet the adverse interest exception even under California law.

5.04 which renders its argument that the adverse interest exception applies completely without merit:

> For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person.
>
> **Nevertheless, notice is imputed** (a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or **(b) when the principal has ratified or knowingly retained a benefit from the agent's action.** A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose.

Setting aside that the CJR Respondents believe GLL dealt with MOL in good faith based on its reasonable belief that split routing was legal and that Mr. McClintock and Ms. Yang's knowledge should be imputed under subparagraph (a) of Section 5.04, *there is no dispute that MOL has retained the benefit of Mr. McClintock and Ms. Yang's actions*, namely, the business secured from GLL. MOL fully acknowledges that it benefited and profited from having GLL business, and MOL has never once in this case suggested that it *lost* money on the GLL account by virtue of the practice of split routing – only that GLL paid MOL less than it should have. [*See, e.g.*, Reply Brief, at p. 44 (MOL claims that it made a "lower rate of return" based on Mr. McClintock and Ms. Yang's alleged conduct. A "lower rate of return" necessarily still implies a positive return)]. MOL has also never disgorged itself of any of the benefits it obtained from having the GLL account. It is also undisputed that Mr. McClintock and Ms. Yang did not personally benefit from approving the practice of split routing. Rather, all benefits inured to MOL.[5]

[5] An e-mail exchange between MOL management, including Mr. McClintock, describes GLL as an important account. (November 2, 2006 e-mail exchange between Paul McClintock, Richard Hiller, and other MOL employees, annexed hereto as Exhibit "S") (CJR App. at p. 311). Another e-mail exchange reflects that GLL paid MOL more than $45 million during 2006 alone. (November 20 and 21, 2006 e-mail exchange between Steve Ryan,

MOL is thus trying to have its cake and eat it too. MOL wants the benefits of the business secured by Mr. McClintock and Ms. Yang but also wants to disavow responsibility for their actions. Setting aside that under Commission law the adverse interest exception does not apply, under the very law which MOL relies upon the exception would unequivocally also not apply. *See* Restatement (Third) of Agency, § 5.04 (2006); *see also Tremont Trust Co. v. Noyes*, 246 Mass. 197, 207-08, 141 N.E. 93, 98 (1923) ("One cannot take the gains of a fraud without also bearing its burdens.") (citing several cases).

The adverse interest exception thus does not apply since MOL has knowingly retained the benefit of its agents' actions. Because MOL accepted GLL's business as well as the cost and efficiency benefits of the split shipments facilitated by its own agents, MOL cannot now try to disavow itself of Mr. McClintock and Ms. Yang's knowledge. Mr. McClintock and Ms. Yang's knowledge is thus imputed to MOL and MOL's claims against the CJR Respondents fail, as set forth in the CJR Respondents' Brief in Response to MOL's Opening Submission.

D. MOL's Reliance on *SeaMaster* is Inapposite.

As a threshold matter, *SeaMaster* is inapplicable because the Judge in *SeaMaster* applied California law to determine whether the adverse interest exception applied. As set forth above, California law does not apply in this case.

SeaMaster is distinguishable for other reasons. In *SeaMaster*, there was no factual dispute as to whether Mr. Yip knew of the alleged activities as it was undisputed that he was the mastermind of the trucking arrangement at issue in the case. *Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.*, Nos. 11-cv-02861-SC, 10-cv-05591-SC, 2013 WL 1191213, at *4

Tsuyoshi Toshida, Paul McClintock, Jim Briles, and other MOL employees, annexed hereto as Exhibit "T") (CJR App. at p. 318). These e-mails further evidence that MOL knowingly accepted the benefits of GLL maintaining its business with MOL. These e-mails also show that other high-level management at MOL were indisputably involved with and knowledgeable of the GLL account, and that Mr. McClintock and Ms. Yang were not "keeping MOL in the dark" and acting adversely to MOL as MOL argues in its Reply Brief.

(N.D. Cal. Mar. 21, 2013). Furthermore, there is no indication in *SeaMaster* that MOL ever disclaimed Mr. Yip's authority to act on its behalf. Stated otherwise, MOL did not wait until the evidence was presented and then acknowledge that its agent was indeed aware of the alleged improper activity.

In contrast, in this case, until this very last stage of this proceeding, MOL has vigorously denied that Mr. McClintock and Ms. Yang knew of the practice of split routing. MOL now acknowledges that Mr. McClintock and Ms. Yang knew of the practice of split routing and alleges that they were colluding with GLL, Mr. Rosenberg and Mr. Briles. MOL's shift in position renders its position not credible and its reliance on *SeaMaster* inapposite.

E. Regardless of Whether Mr. McClintock and Ms. Yang's Knowledge is Imputed to MOL, the ALJ Should Find that MOL Knew or Should Have Known about the Practice of Split Routing such that the Statute of Limitations Should Not be Tolled.

Even if the ALJ finds that Mr. McClintock and Ms. Yang's knowledge is not imputed to MOL (which the ALJ should not, for the reasons discussed herein and in the Respondents' prior submissions), to determine whether the statute of limitations on MOL's claim should be tolled, the ALJ must still determine whether MOL knew or with reasonable diligence *should have known* that it had a claim based on the practice of split routing. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, No. 08-03, at p. 10 (F.M.C. Jan. 31, 2013) (Order granting in part and denying in part Respondent's Motion for Summary Judgment). "[T]he discovery rule is an exception to the time-bar provision and [MOL] has the burden of showing that it falls within the exception by demonstrating that even with the exercise of reasonable diligence, it could not have known of the purported injury." *Id.*

There is an old saying that "a rotten barrel yields bad apples." MOL had a rogue employee, Mr. Yip, whom it disclaimed responsibility for in the *SeaMaster* case. In this case,

until the Respondents filed their submissions in response to MOL's opening brief, MOL considered Mr. McClintock and Ms. Yang to be loyal employees. But once MOL reviewed the evidence submitted by the Respondents, MOL supposedly determined that Mr. McClintock and Ms. Yang were in fact rogue, disloyal employees. And MOL claims that that alleged fact absolves MOL of responsibility for Mr. McClintock and Ms. Yang's actions.

A line must be drawn in the sand. MOL is apparently overwhelmed with employees whom the company considers rogue agents and for whom the company asserts that it is not responsible for their actions. MOL should not be permitted to skirt responsibility by disavowing the actions and knowledge of these agents of the company. There is no evidence whatsoever in the record which demonstrates that MOL implemented any processes or procedures to identify any internal employee misconduct or any allegedly questionable shipping activities by its customers. Indeed, MOL was investigated by the Federal Maritime Commission for its own alleged violations of the Shipping Act and MOL agreed to pay $1.2 million in civil penalties to settle the alleged violations. (*See Mitsui O S.K. Lines Ltd. v. Global Link Logistics, Inc et al.*, No. 09-01, at p. 2 (F.M.C. Oct. 20, 2011) (Memorandum and Order Granting In Part and Denying in Part Olympus Respondents' Motion to Compel Compliance with Outstanding Discovery)) (CJR Exh. F) (CJR App., at p. 40) (discussing MOL's Compromise Agreement with the FMC). During the relevant period MOL thus appears to have been an organization where the "clowns run the circus". MOL cannot in good faith assert that it is a reasonably diligent plaintiff when it is plainly evident that, to the extent the ALJ accepts MOL's argument that others beyond Mr. McClintock and Mr. Yang did not know (which is not credible given all of the evidence),

MOL could have discovered the practice of split routing if it had in place even a modicum of diligence measures aimed at ensuring its own compliance and that of its customers.[6]

Thus, to the extent that the ALJ accepts MOL's argument that it is not charged with knowledge of split routing even though its senior employee, another management-level employee and numerous other employees knew about the practice, the ALJ should still find that MOL's claims for reparations are barred by the applicable statute of limitations because MOL has failed to carry its burden to show that it was a reasonably diligent plaintiff who should not have known about the practice of split routing. See *Pacific Champion Express Co. Ltd*, 28 S.R.R. at 1404.[7]

F. There is No Basis for Holding the CJR Respondents Liable

[6] In its Reply Brief, MOL discusses investigatory measures it took following receipt of the arbitral subpoena in August 2008, but MOL wholly fails to address or identify what steps or measures the company already had in place, if any, to ensure internal compliance. MOL also does not discuss why any such steps or measures, if there were any, failed in this instance.

[7] Among the various ways that MOL tries to avoid the statute of limitations bar, MOL relies on the continuing violation doctrine However, this doctrine is inapplicable as it is well settled that this doctrine does not apply to a series of discrete acts, each of which is independently actionable, even if those acts form an overall pattern of alleged wrongdoing. *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 443 (7th Cir. 2005) (finding that an employee's fraudulent endorsement of checks over an eighty-five month period was not a continuing violation, and stating that "the continuing violation rule does not apply to a series of discrete acts, each of which is independently actionable, even if those acts form an overall pattern of wrongdoing"); *Mitchell v. Goord*, No. 06-CV-6197CJS, 2011 WL 4747878 (W.D.N.Y. Aug. 24, 2011) ("Each Rule 105.12 violation of which [Plaintiff] complains constitutes a discrete act, thus making the continuing violation doctrine inapplicable. . . . Specifically, the continuing violation doctrine applies only to repeated conduct that 'cannot be said to occur on any particular day' and that is not actionable on its own . . . .'distinct incidents involving different time periods, circumstances and locations' do not constitute a continuing violation."); *Beattie v. Dep't of Corr. SCI-Mahanoy*, No. CIV. 1:CV-08-00622, 2009 WL 533051, at *9 n.9 (M.D. Pa. Mar. 3, 2009) ("[I]t is well-settled that the continuing violation doctrine has no applicability to discrete acts or single occurrences. A discrete act does not toll the statute of limitations. Moreover, once a claim for a discrete act is determined to be time-barred, it cannot be resuscitated under the continuing violation doctrine, even if the act is related to acts that would otherwise be timely." (citations omitted) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S.Ct. 2061 (2002); *O'Connor v. City of Newark*, 440 F.3d 125, 126 (3d Cir.2006)); *Clark v. Mason*, No. C04-1647C, 2005 WL 1189577 (W.D. Wash. May 19, 2005) ("As the Ninth Circuit has noted, '[d]iscrete acts are not actionable if time barred, even if related to acts alleged in timely filed charges.' Although plaintiff alleges an 'ongoing campaign' of retaliatory acts against him, the acts alleged are capable of being broken down into discrete events. Indeed, plaintiff himself sorts the claims in his complaint into nine separate issues in his opposition brief. As such, the continuing violation doctrine does not preserve claims that accrued prior to July 19, 2001." (citations omitted) (citing *Cholla Ready Mix, Inc v Civish*, 382 F.3d 969, 974 (9th Cir. 2004)). Here, there is no dispute that each shipment at issue in this case forms the basis for an alleged cause of action. The continuing violation doctrine is thus inapplicable and MOL's claims based on shipments before May 6, 2006 are thus time-barred. MOL's reliance on California cases discussing the continuing violation doctrine is inapposite for the reasons set forth above.

MOL's Reply Brief is glaringly devoid of any legal authority supporting MOL's arguments that Mr. Rosenberg or CJRWE can be held liable for the alleged Shipping Act violations. MOL relies heavily on *Direct Container Line Inc. and Owen Glenn – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 783 (1999). However, *Direct Container Line Inc.* merely approves a settlement between the Bureau of Enforcement and the respondents in that case, a component of which involved the dismissal of the individual respondent. Setting aside that an order approving a settlement is of negligible persuasive value in this proceeding, there is nothing in the actual order which evidences that the Commission reached a conclusion as to what level of participation was sufficient to establish individual liability under Section 10(a)(1). Significantly, as part of the settlement approved by the Commission, the corporate respondent was responsible for the entire fine to be paid to the Commission. The individual respondent was not responsible for any of the fine, and as noted, was dismissed from the case as part of the settlement which the Commission approved. *Direct Container Line* thus in no way stands for the proposition that the ALJ may hold Mr. Rosenberg personally liable without actual evidence of his participation in the alleged transactions.

MOL also throws several other arguments against the wall in an effort to try to make something stick. First, MOL tries to rely on the fact that as a result of GLL's error Mr. Rosenberg apparently remained the qualifying individual for GLL for a short period of time after the 2006 sale. MOL's reliance on this evidence in the face of a lack of any other evidence of Mr. Rosenberg's involvement during the relevant period is strained and tenuous at best. The ALJ should reject MOL's argument that GLL's failure to change Mr. Rosenberg as the qualifying individual after the sale demonstrates that Mr. Rosenberg was still actively involved with the company. Notably, while MOL has relied on the parts of the award from the Arbitration that it

likes, MOL tries to completely ignore the Panel's conclusion that "by 2005 Rosenberg was becoming less and less active in running Global Link." (MOL's Exh. A) (MOL's App., at p. 33).

MOL also makes bald, unsupported assertions that Mr. Rosenberg is liable as the alleged alter ego of CJRWE. Setting aside that MOL bases CJRWE's alleged vicarious liability on Mr. Rosenberg's alleged liability which MOL has failed to establish, there is no evidence in the record to support MOL's newly introduced alter ego theory.

MOL's reliance on *Ariel Maritime Group, Inc.*, 244 S.R.R. 517 (FMC 1987), to try to hold Mr. Rosenberg personally liable is inapposite. In *Ariel,* "inter-woven corporate shells" were used to "hide [] illegal activities", and there was evidence that corporate records for the entities at issue were inaccurate and had been falsified. Here, there is no evidence whatsoever which in any way demonstrates that Mr. Rosenberg has played "corporate shell games". CJRWE was a minority shareholder of GLL during part of the relevant period, and Mr. Rosenberg is the shareholder of CJRWE. No one has disguised or hidden these facts from anybody at any time, let alone from MOL, and there is no evidence remotely suggesting otherwise. Furthermore, there is no evidence indicating that CJRWE did not observe corporate formalities or that CJRWE falsified corporate records, let alone sufficient evidence for the ALJ to pierce the corporate veil.

There is thus no basis for holding the CJR Respondents liable for the alleged violations of the Shipping Act.

CONCLUSION

For the reasons set forth herein and in the CJR Respondents' Brief in Response to MOL's Opening Submission, the ALJ should find in favor of the CJR Respondents on all of MOL's claims.

Respectfully submitted,

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Dated: May 31, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2013, I have this day served the foregoing document upon the following individual(s):

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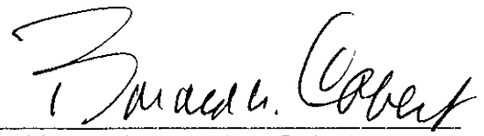

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BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

CONTINUATION OF CJR RESPONDENTS' APPENDIX

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Exhibit "R"

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

COMPLAINANT'S RESPONSE TO ROSENBERG RESPONDENTS'S THIRD INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Complainant, Mitsui O.S.K. Lines, Ltd. ("MOL") herein responds to respondent CJR WORLD ENTERPRISES, INC. and CHAD J. ROSENBERG (collectively referred herein as "Rosenberg Respondents") Third Interrogatories and Requests for Production of Documents:

GENERAL OBJECTIONS

A. MOL objects to Rosenberg Respondents's request as overbroad, excessive in length, redundant, and otherwise unduly burdensome.

B. To the extent that any request may be construed as calling for information that is subject to a claim of privilege or immunity, including, without limitation, the attorney-client privilege or the work product immunity, MOL hereby asserts such privileges or immunities, and objects to the production of information subject thereto.

C. MOL objects to Rosenberg Respondents's instructions to the extent that they purport to impose upon MOL obligations other than those imposed by the FMC Rules of Practice and Procedure.

D. MOL provides its responses to Rosenberg Respondents's request on behalf of itself and for no other persons or entities.

RESPONSES TO ROSENBERG RESPONDENTS'S INTERROGATORIES

Interrogatory No. 1: Please identify every shipment for which you are seeking damages in this proceeding and of which you contend that CJR or Mr. Rosenberg had knowledge. In your answer, please identify all facts supporting your contention that CJR or Mr. Rosenberg had knowledge of the shipment.

Response: In addition to its general objections, MOL specifically objects to this request as being vague, ambiguous and generally unintelligible, since the term "shipment" is undefined, but notwithstanding these objections, MOL is working on identifying those shipments for which GLL provided split-routing instructions and for which MOL was paid less than what it was entitled to pursuant to the tariff or any applicable transportation contract governing the parties. MOL is aware of its obligations to prove its damages, but notes that none of the respondents have taken any affirmative steps to identify which shipments received split-routing instructions—especially since it would appear that the Respondents intend to argue that MOL did not suffer any damages.

With respect to the demand that MOL "identify all facts supporting your contention that CJR or Mr. Rosenberg had knowledge of the shipment", MOL reiterates its general and specific

objections, and notes phrase "knowledge of the shipment" is undefined which effectively prevents MOL from responding effectively and intelligibly. However, notwithstanding these general and specific objections, MOL notes that the Rosenberg Respondents were either shareholders, directors or officers at GLL at the time split-routing instructions were given for certain shipments, and to the extent MOL is able to prove by a preponderance of the evidence it suffered damages as a result of these improper instructions, MOL intends to seek and enforce a judgment against the Rosenberg Respondents.

Interrogatory No. 2: Identify all other instances in the last ten years in which MOL had any knowledge that shipments were being rerouted (i.e., the shipments were not being delivered to the destination on the bill of lading issued to MOL without MOL's knowledge). In your answer, please identify the NVOCC or customer for whom the shipment was being transported. Please also identify all individuals at MOL, the NVOCC and/or the customer who had any knowledge regarding the shipments at issue.

Response: In addition to its general objections, MOL specifically objects to this request as being vague, ambiguous and generally unintelligible, since the term "rerouted" is undefined and the phrase "the shipments were not being delivered to the destination on the bill of lading issued to MOL without MOL's knowledge" is unintelligible and perhaps misrepresents the facts as the parties understand them. Notwithstanding these objections, MOL speculates that the Rosenberg Respondents are inquiring about GLL's prior "split-routing" practice from 2004 thru 2007 whereby GLL would perform the following tasks in order to avoid having to pay MOL its regular and ordinary freight rate: (a) GLL would book a containerized shipment of cargo, for example furniture from China, for travel to some point within the interior of the United States; (b) an MOL master bill of lading with the previously identified point of destination would be

issued; (c) GLL would directly and without MOL's knowledge contact MOL's trucker who was supposed to deliver the cargo to the previously identified point of destination on the MOL master bill of lading; (d) GLL would instruct the trucker to deliver the cargo to a destination which differed from the MOL master bill of lading; and (e) the difference in pricing between the destination listed on the MOL master bill of lading usually resulted in a smaller freight rate charge to MOL than would have been the case had GLL initially booked the cargo with the correct and accurate final destination listed on the MOL master bill of lading. If the Rosenberg Respondents are in fact referring to the above referenced "split-routing" practices engaged by GLL, and while the Rosenberg Respondents were shareholders, directors or officers of GLL, then—notwithstanding the above referenced general and specific objections—MOL does not have any knowledge that shipments were being rerouted by other NVOCCs or customers in the last ten years.

Interrogatory No. 3: Please identify and describe with particularity the duties and responsibilities for each employee of MOL who has knowledge of any instances in which GLL shipments were re-routed, including but not limited to Paul McClintock, Rebecca Yang, Nicole Hensley, Lacy Bass, Ted Holt, and Kevin Hartmann. In your answer, please include any titles each employee has held during the entire period in which they are or were employed with MOL. Please also state whether each person supervised any other employees of MOL, and please identify the person whom each person reported to as well as that person's title. Please also identify any employment or other agreements which MOL had with each person.

Response: In addition to its general objections, MOL specifically objects to this request as being vague, ambiguous and generally unintelligible, since the terms "rerouted" and "shipments" are undefined. MOL further objects to this request in that it presupposes that MOL employees

had "knowledge of any instances in which GLL shipments were re-routed" and misrepresents the record in evidence. MOL assumes that the Rosenberg Respondents are inquiring about whether any MOL employees had prior knowledge that GLL was regularly instructing MOL's truckers to deliver the cargo to a destination which differed from the destination listed on the MOL master bill of lading, in contravention to the applicable tariff or transportation contract. In answer to this particular question, MOL advises that no MOL employees had prior knowledge that GLL was regularly instructing MOL's trucker to deliver the cargo to a destination which differed from the destination listed on the MOL master bill of lading, in contravention to the applicable tariff or transportation contract.

Notwithstanding its general and specific objections, MOL provides the following work history of the following individuals:

Paul G. McClintock, Sr.: served as an Regional Vice President/General Manager from 1995 thru 2008 and as a Vice President from 2008 until 2009, when he left the company. His general duties and responsibilities included: maintain and initiate contact with existing and prospective customers; prepare and monitor budgets for his office, as well as budgets for regional and sales responsibilities; promote core values between sales and operations; oversee office administration; and review vendor contracts.

Rebecca Yang: served as a Manager from 2006 thru 2998 as a Manager, as a Regional Sales Manager from 2008 thru 2010, and as a District Manager from 2010 until 2011 when she left the company. Her general duties and responsibilities included: maintain and initiate contact with existing and prospective customers; develop sales plan with target accounts; work towards achieving and exceeding sales goals; prepare budgets for sales and expenses; oversee

correspondence between sales coordinators and accounts; and promote teamwork between primary office and other offices within MOL.

Anna "Nicole" Hensley: served as a Coordinator from 2001 thru 2009, and as a Supervisor from 2009 to present. Her general duties and responsibilities included: liaison with vendors, terminal, rails, truckers and MOL as required; effecting store pick-up and store door delivery; empty container repositioning; coordinate daily operations activities and Alliance issues; and coordinate special customer and equipment requirements.

Laci L. Bass: served as a Coordinator from 2006 thru 2009 when she left the company. Her duties and responsibilities included: approve, code and process local invoices as required; liaison with vendors, terminal, rails, truckers and MOL as required; effecting store door pick-up and store door delivery; validate vessel B/L data; perform auto-route and auto group functions; and coordinate special customer and equipment requirements.

Edward Y. "Ted" Holt: served as a Manager from 2004 to present. His general duties and responsibilities included: manage and assist operations staff; liaison with vendors, terminal, rails, truckers and MOL as required; provide input on vendor selections; provide daily management of chassis pool; validate vessel B/L data; empty container and chassis repositioning; coordinate daily operations activities and Alliance issues; coordinate special customer and equipment requirements; maintain department activity within budget constraints; and develop local operations policy.

Kevin J. Hartmann: served as an Assistant Vice President from 2002 thru 2009, and as a Vice President from 2009 to present.

MOL is unaware of any employment or other written agreement with the above referenced persons.

RESPONSE TO ROSENBERG RESPONDENT'S REQUEST FOR DOCUMENTS

Request for Production No. 1: Any and all documents and ESI evidencing or supporting your contention that Mr. Rosenberg or CJR had knowledge regarding any shipments identified in your answer to Interrogatory No. 1 above.

Response: MOL incorporates by reference its Response to Interrogatory No. 1 and respectfully refers to its prior production of documents, including that prepared by outside vendor, Iron Mountain. MOL notes that it is not the custodian of GLL's documentation and suggest that any demands concerning documents in the exclusive care, custody or control of GLL should be directed towards GLL. MOL does intend to rely upon the testimony, documentation and awards generated during the AAA arbitration, Case No. 14 125 Y 01447 07, entitled "Global Link Logistics, Inc., et al. v. Olympus Growth Fund III, et al.".

Request for Production No. 2: Any and all documents and ESI evidencing, demonstrating or relating to the shipments identified in your answer to Interrogatory No. 2 above.

Response: MOL incorporates by reference its Response to Interrogatory No. 2 above and respectfully its prior production of documents, including that prepared by outside vendor, Iron Mountain. MOL notes that it is not the custodian of GLL's documentation and suggest that any demands concerning documents in the exclusive care, custody or control of GLL should be directed towards GLL. MOL does intend to rely upon the testimony, documentation and awards generated during the AAA arbitration, Case No. 14 125 Y 01447 07, entitled "Global Link

Logistics, Inc.,.et al. v. Olympus Growth Fund III, et al.".

Request for Production No. 3: Any and all documents and ESI evidencing, demonstrating or relating to your answer to Interrogatory No. 3 above, including but not limited to any employment or other agreements identified in your answer.

Response: MOL incorporates by reference its Response to Interrogatory No. 3 and reiterates its prior statement that it is unaware of any employment and/or written agreements with the above referenced persons.

Dated: June 10, 2011
New York, NY

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Mitsui O.S.K. Lines, Ltd.

NEWYORK_DOWNTOWN\2365407\1 275609.000

Exhibit "S"

From: CN=Paul Mcclintock/O=MOL/C=US
Sent: 11/02/2006 06:16:51 pm
To: CN=Richard Hiller/O=MOL/C=US@USMOL
Cc: David.Prado@molasia.com; Michael.Goh@molasia.com
Bcc:
Subject: Re: Fw: The President & VP of Global Link

Rich,

I agree with your points. Fortunately, GL does not realize how much we bend, twist and manipulate their volume. We have used every excuse in the book for rolled and shut out containers.

Jim Briles is the brains behind GL's operation and Gary has no idea of the details of the business although Gary is the boss. I recommend that you spend time thanking GL for the business and advise them how important of an account they are for MOL. Jim is MOL's supporter at GL so he is always defending MOL higher rate levels and space problems to GL board members. Just make Gary and Jim feel their business is very critical to MOL and GL will book whatever we want whenever we want it.

I believe that it is also important that they feel that GL is part of a long term plan for MOL since they want to grow with MOL. We have done a good job working with Jim to target business that makes good business sense for MOL since much of their business is too low rated for MOL. Jim has worked with us to match import business to export demand areas. One example of this strategy is GL's Monroe La. business. Every container we move for GL into Monroe matches up with an export container for Graphic packaging. We control this RT move carefully and GL has proven to be very cooperative and supportive of this kind of strategy. Our growth with GL will depend on promoting this kind of strategy

The timing for the meeting in HK is perfect for Michael and David as peak is over and so are the major space problems we have faced all peak with this account.

If they bring up the double rolled containers from Vietnam, advise them that you are not controlling that allocation on a customer level. You can advise them that it is against MOL policy to double roll so the problem must have been beyond the control of our local Vietnam staff. In other words a vessel skip, weather issues, labor etc...

Richard Hiller
CCRTP
11/02/2006 09:58 AM

To: Michael.Goh@molasia.com
cc: David.Prado@molasia.com, Paul Mcclintock/MOL/US@USMOL
Subject: Re: Fw: The President & VP of Global Link

Michael, no doubt Global Link is important to us as turn on/turn off cargo. The yield is not great though there is contribution to vessel/admin---I think the account generally understands this and we do give them good service other than the fact that one week we may take 500 loads and the next week 100. I doubt

this level of mgmt would bring this up with you but they could---our response would be that we will be growing our bsa significantly over the next few years and that this situation will ease. Naturally you may want to indicate our willingness to do more with them in other trades if they have the business (we could even help them develop business if they like---as you know this kind of statement goes a long way with NVO's).

Paul, any other issues for Michael to discuss?

Thks...Rich Hiller

Michael.Goh@molasia.com

11/01/2006 09:33 PM
To: Richard Hiller <Richard.Hiller@MOLAmerica.com>
cc: David.Prado@molasia.com
Subject: Fw: The President & VP of Global Link

Rich,

Are there any issue we should discuss with the two executives of Global Link from Europe i.e. Mr. Gary Meyer, President and Mr. Jim Briles, VP?

I remember advising you that Antonio Leung (formerly ACS VP in HK) has joined Golden Gate (who also owns Global Link) as Senior VP for Merger and Acquisition.
Regards

M Goh

----- Forwarded by Michael Goh/MOLASIA on 11/02/2006 01:24 PM -----
Carmen Kong/MOLASIA
11/02/2006 11:22 AM

To
Michael Goh/MOLASIA@MOLASIA
cc
David Prado/MOLASIA@MOLASIA, Michael Yip/MOLASIA@MOLASIA
Subject
Re. The President & VP of Global LinkLink

Dear Goh san,

Antonio confirmed Pacific Club for dim sum is fine I have reserved a window-side table on Nov 12 (Sun) at 12.30 pm at Bauhinia, Pacific Club. Antonio will also join the lunch. Thanks.

Regards,

Carmen Kong
Secretary Office
MOL (Asia) Ltd.
Tel : (852) 2823 6817
Fax : (852) 2865 0906

Michael Goh/MOLASIA
11/02/2006 10:57 AM

To
Carmen Kong/MOLASIA@MOLASIA
cc

Subject
Re. The President & VP of Global LinkLink

I am OK for lunch on Sunday Nov 12. Ask Antonio if he has any preference on venue. If not then suggest (1) Pacific Club for Dim Sum or (2) Ye Shanghai...

Carmen Kong/MOLASIA
11/02/2006 09:56 AM

To
Michael Goh/MOLASIA@MOLASIA
cc

Subject
Re. The President & VP of Global LinkLink

Dear Goh san,

Just received a phone call from Antonio who advised that two gentlemen are able to have a lunch with you on Nov 12 (Sun) Please advise if you can meet them on Sun, otherwise Antonio will further check with them if they want to have a drink on Sat evening after 9 pm Thanks

Regards,
Carmen Kong
Secretary Office
MOL (Asia) Ltd.
Tel : (852) 2823 6817

Fax : (852) 2865 0906

Carmen Kong/MOLASIA
11/02/2006 09:18 AM

To
Michael Yip/MOLASIA@MOLASIA
cc
David Prado/MOLASIA@MOLASIA, Michael Goh/MOLASIA@MOLASIA
Subject
Re The President & VP of Global LinkLink

Dear Michael,

I haven't got reply from Mr. Antonio Leung. Will check with him this afternoon.

Regards,
Carmen Kong
Secretary Office
MOL (Asia) Ltd.
Tel : (852) 2823 6817
Fax . (852) 2865 0906

Michael Yip/MOLASIA
11/01/2006 06:40 PM

To
Carmen Kong/MOLASIA
cc
Michael Goh/MOLASIA, David Prado/MOLASIA
Subject
Re: The President & VP of Global LinkLink

Carmen,

Any set up on Nov 9.afternoon,
Am remain open for the visitors

rgds/m.yip

Michael Goh/MOLASIA
2006/10/31 12:20 PM

To
Carmen Kong/MOLASIA@MOLASIA
cc
David Prado/MOLASIA, Michael Yip/MOLASIA@MOLASIA

Subject
Re The President & VP of Global LinkLink

Carmen

I can see them on 9th morning till around noon otherwise I will have to ask Michael Yip to meet them since both Dave Prado and I will be leaving for Manila from 9th afternoon and won't return till 11th evening around 2000 hrs.
If needed I can also catch them for drinks on the 11th evening at around 9 pm if they are still in HK.

Regards

M Goh

Carmen Kong/MOLASIA
10/31/2006 10:12 AM

To
Michael Goh/MOLASIA@MOLASIA
cc

Subject
The President & VP of Global Link

Good morning Goh san,

Mr. Antonio Leung (tel. no. 9326 0376) just called and would like to know if you are able to meet up with the executives of Global Link from Europe in Nov The President, Mr. Gary Meyer and the VP, Mr Jim Briles will be visiting HK on Nov 9 morning and stay 2 days here. If you are not able to see them, he prefers you to delegate someone to do it.

Please note you will be in Manila for AEM. Please advise. Thanks.

Regards,
Carmen Kong
Secretary Office
MOL (Asia) Ltd.
Tel : (852) 2823 6817
Fax : (852) 2865 0906

Exhibit "T"

From: CN=Paul Mcclintock/O=MOL/C=US
Sent: 11/21/2006 12:34:52 pm
To: CN=Jeffrey Bumgardner/O=MOL/C=US@USMOL
Cc:
Bcc:
Subject: Global Link / Wickes

----- Forwarded by Paul Mcclintock/MOL/US on 11/21/2006 09:34 AM -----

Tsuyoshi Yoshida
CCREC
11/21/2006 09:25 AM
To Stephen Ryan/MOL/US@USMOL
cc: Paul Mcclintock/MOL/US@USMOL, Richard Hiller/MOL/US@USMOL
Subject: Global Link / Wickes

Steve,

The attached exchange with Global Link refers.

How much/at what rate level we wants to carry Global Link next year will remain to be decided. We need to consider our new additional space for East Coast as well as market trend and our success/failure of other business. However, no matter whether it turns to be aggressive or positive or modest or negative, we should not talk our policy to any party outside at any occasion.

Andrew seems to have been over confident of his close relation with the person he talked to. But however closest he felt, he should not communicate in such a way. I guess my e-mail will be circulated from Global Link to Wickes pretty soon. Appreciate if you have a quiet word with him and tell him not to do it again

Thanks and regards

T. Yoshida
MOL(America) Inc
One Concord Centre,
2300 Clayton Road, Suite 1500, Concord, CA, 94520
Tel 925-688-2663
Fax . 925-688-2669
----- Forwarded by Tsuyoshi Yoshida/MOL/US on 11/21/2006 08:42 AM -----

Tsuyoshi Yoshida
CCREC
11/21/2006 08:41 AM
To Jim Briles <JBriles@globallinklogistics com>
cc. Jeffrey.Bumgardner@MOLAmerica.com, Paul Mcclintock <Paul Mcclintock@MOLAmerica.com>, Rebecca.Yang@MOLAmerica com, Richard.Hiller@MOLAmerica com
Subject RE. FW: Cancelled Mitsui contract??

Dear, Jim,

We highly appreciate your strong support and we have no intention to terminate relationship with your good company. There must be some misunderstanding I will take the issue very seriously.

Regards,

T. Yoshida
MOL(America) Inc
One Concord Centre,
2300 Clayton Road, Suite 1500, Concord, CA, 94520
Tel : 925-688-2663
Fax : 925-688-2669

Jim Briles <JBriles@globallinklogistics.com>

11/21/2006 05:27 AM To: Paul Mcclintock
<Paul.Mcclintock@MOLAmerica.com>, Jeffrey.Bumgardner@MOLAmerica.com,
Rebecca.Yang@MOLAmerica.com
cc Richard.Hiller@MOLAmerica.com, Tsuyoshi.Yoshida@MOLAmerica.com
Subject: RE: FW: Cancelled Mitsui contract??

Can somebody pls address this today?

-----Original Message-----
From: Jim Briles
Sent: Monday, November 20, 2006 4:23 PM
To: Paul Mcclintock; 'Jeffrey.Bumgardner@MOLAmerica.com';
'Rebecca.Yang@MOLAmerica.com'
Cc: 'Richard.Hiller@molamerica.com'; 'Tsuyoshi.Yoshida@molamerica.com'
Subject: FW: FW: Cancelled Mitsui contract??

Paul--what is going on with this guy Andrew at MOL? This is the second time in two months he has told my customer the same thing; that MOL is going to cancel my contract in February and he should sign directly with MOL. Why is MOL back-selling me to my customer and why is he saying our contract will be cancelled early? This is completely inexcusable and will not be tolerated. We have built a solid relationship with your office in Atlanta, however if MOL in total does not respect this relationship-then we will move our business elsewhere. Year to date we have already paid MOL over $45M and planned to increase that next year as your capacity contraints are hopefully lifted. However-if this is how MOL feels about our partnership and is going to cancel our contract in February anyway, please prepare an amendment to cancel my contract today as I will use my other carriers who appreciate my business and do not have to fear them targeting my customers directly. I expect this amendment asap as well as an explanation as to why MOL would back sell us though we have supported MOL fully over the past 2 1/2 years, in peak and slack equally!

-----Original Message-----
From: Erin E Brown
Sent: Monday, November 20, 2006 11:32 AM
To: Phillip Ousley
Cc: Jim Briles
Subject: RE: Cancelled Mitsui contract??

Phillip - not sure if Tim told you but apparently this Andrew from Mitsui called him again and continued to insist that Mitsui was cancelling our contract come Feb and he would be calling Tim back then to call on the biz.

Thanks,
Erin

-----Original Message-----
From: Phillip Ousley
Sent: Tuesday, October 10, 2006 10:27 AM
To: Erin E. Brown; Jim Briles
Cc. Gary Meyer; Blake Shumate
Subject: Re: Cancelled Mitsui contract??

I already handled..

Answerd are no and no.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Erin E. Brown
To: Jim Briles
Cc: Phillip Ousley; Gary Meyer; Blake Shumate
Sent: Tue Oct 10 10.49:10 2006
Subject: Cancelled Mitsui contract??

Jim,

An ""Andrew"" from Mitsui called Tim at Wickes last week to report that Global Link's contract is being cancelled shortly and that if Wickes wants to protect their business they should sign direct with MOL. This said salesperson is meeting with Tim later this week.

1) Is our contract being cancelled?
2) Should MOL be blatently going after our top biz like this?

Please advise,
Erin

Erin E. Brown
Customer Account Team Leader, Chicago Region Global Link Logistics
Direct: 847.520.6875
Email: ebrown@globallinklogistics.com
www.globallinklogistics.com